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No. 86-147

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HOME WARRANTY CORPORATION, *et al.*,
Petitioners,

v.

JOHNNIE L. CALDWELL,
INSURANCE COMMISSIONER OF THE STATE OF GEORGIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. RESPONDENT FAILS TO MEET THE ISSUES RAISED BY PETITIONERS.

In their Petition for Writ of Certiorari, Petitioners [1] argued that the case raised an important question of federal law which has not been, but should be, settled by this Court. Specifically, Petitioners asserted that the decision of the Court of Appeals for the Eleventh Circuit misconstrued the intent of Congress and engrafted qualifying criteria onto the Product Liability Risk Retention Act, 15 U.S.C. Sec. 3901, *et seq.*, which were neither required by the statute nor supported by legislative history. Specifically, Petitioners pointed out that the Eleventh

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[1] Pursuant to Rule 28.1, Petitioners listed their corporate affiliations in footnote 1 of their Petition for Writ of Certiorari.

Circuit committed error by engrafting onto the legislation requirements that: (1) the protection accorded by a risk retention group must not be merely "an alternate source" of compensation to the injured party; and (2) the liability of the insured, or, alternatively the insured's right of recovery, must arise from tort law rather than from contract, or a combination thereof. *See* Petition for Writ of Certiorari at pp. 9-12. Petitioners made specific reference to the legislative history of the Product Liability Risk Retention Act to demonstrate that Congress intended neither such requirement to be imposed.

Respondent ignores this argument except for bald statements that the Eleventh Circuit was "merely reciting some factors which it considered relevant" and that "Petitioners confuse the Court of Appeals' attempt to clarify the record with subversion of congressional intent." *See* Brief in Opposition at p. 14. Respondent instead chose to argue that the state of the factual record below warranted a remand and that somehow this case is premature for Supreme Court consideration.

Respondent has missed the entire thrust of Petitioners' Petition for Writ of Certiorari. As illustrated by the Petition for Certiorari, the Court of Appeals, in remanding the case back to the District Court, was not merely reciting some relevant factors but rather was instructing the District Court to apply qualifying criteria to the Product Liability Risk Retention Act which are found nowhere in the Act. Furthermore, Respondent's emphasis on the issue of whether or not the state of the record required a remand is superfluous. Petitioners have not and do not intend to argue before this Court whether the District Court for the Northern District of Georgia had sufficient evidence of record to enter judgment or whether the Court of Appeals was correct in concluding that the factual record was incomplete. Such considerations do not warrant Supreme Court review.

What does warrant Supreme Court review, however, is the fact that in the instant case a Court of Appeals de-

cided to legislate. For whatever reasons, the Eleventh Circuit decided, in essence, that the qualifying criteria established by Congress in the Product Liability Risk Retention Act was not to the Court's liking. The fact that this is the first federal appellate court decision interpreting the Act, makes the error all the more glaring.

It is well established that where congressional intent in discernable, courts must give effect to that intent and not substitute their own views for those of Congress. *See e.g., Anderson v. Wilson*, 289 U.S. 20, 27 (1933). The Court of Appeals for the Eleventh Circuit in the instant case, ignored that principle. Accordingly, Petitioners assert that as a result, an important question of federal law has been raised which should be settled by this Court and Petitioners' petition should therefore be granted.

II. THE INSTANT PETITION IS NOT PREMATURE.

Citing the case of *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1949), Respondent argues that the Petition for Writ of Certiorari is premature because "the Court of Appeals was unable to reach a definitive conclusion as to whether the nature of HOW's undertakings and the 'orchestration' of its program are such as should entitle it, on the basis of the record, to claim the benefits of the Risk Retention Act." *See* Brief in Opposition at p. 13.

Respondent is misinformed. The mere fact that the Court of Appeals remanded the case does not divest this Court of jurisdiction. Under 28 U.S.C. Sec. 1254(1), this Court may review a decision from the Court of Appeals *before or after* the appellate court has rendered a judgment. In this regard, finality of an order or judgment is not a prerequisite to petition the Supreme Court for a Writ of Certiorari under Sec. 1254(1). *See, Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *Forsythe v. City of Hammond*, 166 U.S. 506, 513-14 (1897).

As one commentator has noted:

> This rule is sound. First, if finality were required, the Court would often be obliged to devote considerable time to determining whether the Court of Appeals had rendered a final judgment; and, in many cases, a review by the Court would be unduly delayed while the Court awaited the final judgment of the lower court. In addition, given the discretionary nature of the Writ, the Court should be free to step into a proceeding if the order or judgment of the appellate court albeit not final, merits review *at that time.*

12 Moore's Federal Practice, (2d Ed. 1982) para. 434.01[3] (footnote omitted) (emphasis added).

Under 28 U.S.C. Sec. 1254(1), this Court at all times has jurisdiction to exercise its discretion to review a court of appeals judgment or order which raises important questions of law. This case presents such a situation and warrants immediate action by this Court. Accordingly, the petition is not premature.

CONCLUSION

In the instant case, the only federal court interpreting the Product Liability Risk Retention Act has chosen to exceed its judicial bounds and, in essence, amend the Act to include qualifying criteria neither mandated by Congress nor within the legislative intent of Congress. Petitioners submit that this case presents important questions of law warranting the grant of their Petition for Writ of Certiorari.

Respectfully submitted,

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